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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 907

N. V. HANDELSBUREAU LA MOLA, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The district court rendered no opin The opinion of the court of appeals (Pet. App. A, pp. a1–a9) is reported at 299 F. 2d 923.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1962 (Pet. App. B, pp. a10–a11). The petition for a writ of certiorari was filed on April 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a Netherlands corporation, which admittedly was an "enemy" under Section 2(a) of the Trading with the Enemy Act during hostilities and the German occupation of the Netherlands, continued to be an "enemy" after the occupation terminated, and therefore was precluded from maintaining an action under Section 9(a) of the Act for return of its property vested by the United States in 1950.

STATUTE INVOLVED

The pertinent provisions of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, are as follows:

> *Section 2.* The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> * * * * *
>
> *Section 7(c).* If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications

therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

Section 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or

delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1–6 and 7–39 of this Appendix], and until any final judgment or decree

> which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * * *

STATEMENT

Petitioner, a Netherlands corporation, brought this suit in the district court against respondent, the successor to the Alien Property Custodian under Section 9(a) of the Trading with the Enemy Act, to recover property (bank deposits in the United States) seized or "vested" in 1950. It claimed (J.A. 4)[1] that, although it admittedly was an "enemy" during the period of German occupation of the Netherlands, it ceased to be such when the occupation terminated in 1945; and that it was therefore not barred from maintaining this suit by Section 9(a), which permits such suits only by someone who is "not an enemy."

The Government moved for summary judgment, contending that petitioner was an "enemy" under the Act because (1) it was a corporation incorporated in the Netherlands, a nation occupied by Germany while Germany was at war with the United States; (2) it was a corporation incorporated outside the United States and doing business within both enemy-occupied (Netherlands) and enemy (Germany) territory; and (3) it was enemy-"tainted" because of ownership and

[1] J.A. refers to the Joint Appendix filed in the court of appeals.

control by persons in Germany during World War II (J.A. 15–16).

The undisputed facts show that petitioner was doing business in the Netherlands throughout the war (J.A. 22–23, 37–46); and that it was the sole stockholder of Tim-Unitas G.m.b.H. (J.A. 18, 38), a German firm which, during World War II, converted to war production in connection with the fighter plane program (J.A. 18, 76–92), and of Gutschow & Co. G.m.b.H., a German firm manufacturing calculating machines in Germany (J.A. 18). Petitioner was also a large shareholder in other corporations which were either incorporated in Germany or doing business there (J.A. 18–19, 23–27, 36–46). Before and during World War II, petitioner made loans to its subsidiaries and others in Germany, collected interest and repayments of principal from them, borrowed large sums from persons in Germany (J.A. 19–20), and gave powers of attorney to persons in Germany to vote its stock and otherwise represent it (J.A. 19). The record also shows that throughout World War II petitioner was owned and controlled by E. F. Gutschow, a citizen and resident of Germany or by his son-in-law Henrik Heegaard, a Norwegian citizen who also resided in Germany throughout the war (J.A. 23–24, 30, 33, 73, 109–110).

The district court granted respondent's motion for summary judgment (J.A. 116). The court of appeals remanded to the district court to dismiss the complaint for lack of jurisdiction. In a unanimous opinion by Judge Fahy (in which Judges Edgerton and Prettyman joined), the court held that the enemy status which petitioner had acquired during the war

as a result of the German military occupation of the Netherlands did not terminate when the German occupation ended. The court pointed out (Pet. App. A, a3) that the war did not end until the Joint Resolution of Congress in 1951, after petitioner's property had been vested, and that in that resolution "Congress provided that property which had been subject to vesting and seizure prior to January 1, 1947, would continue to be subject to the provisions of the Act." The court stated (*id.*, a4) that "[t]he purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation," and it ruled (*id.*, a5):

> * * * the definition of enemy in section 2 of the Act, as one who is "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "incorporated within such territory" is not to be construed as referring only to one who at the date of the vesting order is a resident of or chartered by a nation with which the United States "is [still] at war"; rather, it is to be construed as including a person who or corporation which, at the time of the vesting order, is one who has been a resident of an enemy occupied nation during its occupation or was then incorporated under the laws of an occupied territory and resident therein. * * *

ARGUMENT

Both courts below held that petitioner was an "enemy" within the meaning of Section 2(a) of the Trading with the Enemy Act and thus precluded, under

Section 9(a) of the Act, from maintaining a suit to recover the vested property. The decision is clearly correct. The issue is fundamentally the same as in *Bank Voor Handel En Scheepvaart N.V.* v. *Kennedy*, 288 F. 2d 375 (C.A.D.C.), in which the Court denied certiorari last Term, 366 U.S. 962. The only difference is that in the *Voor Handel* case the vesting took place during the enemy occupation of the Netherlands, and in the present case it took place after such occupation, but prior to termination of the state of war. As we show below, this distinction is immaterial in determining whether petitioner could maintain this action. Furthermore, at this late stage of the administration of the alien property program, the question is of little current importance.[1a] Review by this Court is thus not warranted.[2]

[1a] Of the more than 19,000 claims for return of vested property that were filed administratively by persons asserting ownership interests, only 621 were still pending before the Custodian's successor as of April 30, 1962. Petitioner itself points out (Pet. 12, emphasis in original) that "the decision below is the *only* decision on the question in the forty-five years since the Act was enacted." As noted in the brief in opposition in *Voor Handel* (No. 958, October Term, 1960, p. 10), the administrative program for the return of property to residents of enemy-occupied territory has operated to the mutual satisfaction of this government and the other governments concerned.

[2] Since the court of appeals ruled that the enemy status, admittedly acquired during the enemy occupation, was not lost by termination of the occupation, there was no need to consider the further claims of the government that the undisputed facts show that petitioner was enemy-tainted and was also a foreign corporation doing business in enemy and enemy-occupied territory. These would be two additional grounds which precluded petitioners from maintaining this suit. If certiorari should be granted, the government reserves the right to urge these additional grounds in support of the judgment below.

1a. Petitioner admits that it is a Netherlands corporation, (Pet. p. 3) and that the Netherlands was occupied by Germany, a nation at war with the United States (Pet. p. 9). These facts, as petitioner admits (Pet. 19), made it an "enemy" whose property was subject to seizure. Section 2(a) of the Act (*supra*, p. 2) defines "enemy" as "any corporation incorporated within" the "territory (including that occupied by the military and naval forces) * * * * of any nation with which the United States is at war * * *." Section 9(a) authorizes suit for the return of vested property only by "[a]ny person not an enemy or ally of enemy." Under the express terms of Sections 2(a) and 9(a), therefore, petitioner is an "enemy" and barred from maintaining this suit.

Petitioner contends (Pet. 19), however, that even though it was an enemy during hostilities, it ceased to be such when the German occupation ended; and that it therefore is not an "enemy" within the meaning of Section 9(a). But Congress drew no such distinction between enemies during and after hostilities. It broadly defined "enemy" to include any corporation incorporated within a territory occupied by the military or naval forces of a country with which the United States is at war, and then barred every "enemy" from maintaining a suit for return of its property that had been vested.

Enemy status does not terminate when the war ends (*Swiss Ins. Co.* v. *Miller*, 267 U.S. 42, 45), or when hostilities or enemy occupation ceases, or when residence within the enemy country is over. See *Bank Voor Handel En Scheepvaart N.V.* v. *Kennedy*, 288 F. 2d

375 (C.A.D.C.), certiorari denied, 366 U.S. 972; *Hansen* v. *Brownell*, 234 F. 2d 60 (C.A.D.C.); *Brownell* v. *Ochmichen*, 243 F. 2d 637 (C.A.D.C.), certiorari denied, 355 U.S. 842; *Kennedy* v. *Christiani-Onken* (C.A.D.C. No. 16364, decided March 15, 1961), *Kennedy* v. *Rommel and DeCourten* (C.A.D.C. Nos. 16447, 16448, 16449, 16450, decided March 15, 1962). Cf. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C.A.D.C.) certiorari denied, 275 U.S. 546. Congress, in the exercise of its broad war powers, may treat certain persons as "enemies" even after hostilities have ceased. It has done so in the Trading with the Enemy Act, and in Section 9(a) it barred a suit to recover vested property by any person who was an enemy during the period when the United States was at war.

The Act, moreover, imposes no requirement that vesting or seizure of enemy property take place during the period of hostilities or enemy occupation.[1]

[1] In *Willenbrock* v. *Rogers*, 255 F. 2d 236 (C.A. 3), relied on by petitioner, the parties contested the "residence" of plaintiff, a German national, who had lived in Germany from 1932 to 1949 and thereafter in the United States. After ruling in favor of the government on the issue of residence, the court adverted to the fact that the vesting orders involved were issued in 1947 and 1950. Although the point had not been briefed or argued, the Third Circuit ruled that, as to the 1950 vesting order, the case should be remanded to the trial court for a determination as to whether or not plaintiff had changed her residence before the 1950 vesting order. To the extent that this decision stands for the proposition that enemy status under the Act may be shed by removal of residence from enemy territory before vesting occurs, it is inconsistent with *Brownell* v. *Ochmichen*, *supra*; *Christiani-Onken*, *Rommel and DeCourten* and *Hansen*, *supra*, where the claimants were denied recovery of property which had been vested after the claimants had left the enemy territory and while they were residing in neutral or allied countries. See also the *Swiss Ins. Co.* and *Schrijver* cases, *supra*.

As the court of appeals pointed out (Pet. App. A, a3), the war with Germany had not been officially terminated when petitioner's property was vested. Furthermore, in the Joint Resolution of peace between the United States and Germany, 65 Stat. 451, adopted on October 19, 1951, Congress specified that property to which enemy status had attached during the war was to remain subject to vesting and seizure. The Resolution provided that:

> *any property* or interest which prior to January 1, 1947, *was subject to vesting or seizure* under the provisions of the Trading With The Enemy Act of October 6, 1917, as amended, or *which has heretofore been vested* or *seized* under that Act * * * *shall continue to be subject to the provisions of that Act* in the same manner and to the same extent as if this resolution had not been adopted * * * [emphasis added].

b. The holding of the court of appeals is supported not only by the language of the statute, but by its underlying policy. Seizure of enemy property serves two purposes: (1) it prevents the enemy from using such property in its war effort, and (2) it enables the United States to use the property in its own war effort. The government's war effort does not cease when hostilities terminate. There are still many important problems, growing out of and closely related to the war, that must still be resolved, and enemy seized property is useful in performing such functions. Thus, seizure even after hostilities have terminated may substantially aid the war effort. The government's right to obtain enemy property cannot depend

upon the speed with which it finds and seizes the property. As the court of appeals pointed out (Pet. App. A, a4):

> The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation * * * actual vesting might not then be possible. * * * investigation might entail a considerable period of time before a determination is made that the property is owned or controlled by an enemy.

Indeed, only a relatively small number of vesting orders were actually issued during hostilities: the majority were issued between 1945 and 1953.* Under petitioner's theory, however, the government would be precluded from seizing enemy property if it did not discover it or complete the mechanics of vesting while active hostilities were still going on. Those enemies who effectively concealed their ownership or interest could preclude the government from vesting enemy property.

2. As noted above, petitioner's enemy status, deriving from its location in enemy-occupied territory, had a dual effect: It made petitioner's property subject to seizure and it precluded suit under Section 9(a), which runs only to persons who are not "enemies" as that term is explicitly defined in Section 2 of the Act. There remains the suggestion that the statute is unconstitutional if deemed to preclude, after

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* As of January 1, 1945, there had been only approximately 4,400 such vesting orders issued. See V.O. 4405 (December 21, 1944), 9 F.R. 14860. At the close of the vesting period in 1953, some 19,000 vesting orders had been issued. See V.O. 19312 (April 15, 1953), 18 F.R. 2207.

the state of war has been officially terminated, recovery of property vested after enemy occupation has ceased, where the pre-vesting owner was merely a "technical enemy"[5] (*i.e.*, an "enemy" by virtue of enemy occupation of the territory in which he resided) in the first instance. If, however, the statutory remedy should be deemed constitutionally inadequate, which we deny, the conclusion is not that Section 9(a) may be rewritten to give petitioner a right to sue in the district court, but, rather, that petitioner should have proceeded in the Court of Claims by way of a suit for just compensation based on the Fifth Amendment. *See Cities Service Co.* v. *McGrath*, 342 U.S. 330, 335; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479–480; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481. See, also, the government's discussion of this question in *Bank Voor Handel en Scheepvaart, N.V., et al.* v. *Robert F. Kennedy, Attorney General of the United*

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[5] Section 32 of the Act, 50 U.S.C. App. 32, providing for the recovery of vested property by certain "technical enemies," affords a measure of discretionary administrative relief to our allies and friends. Cf. Pet. p. 13. See *Schilling* v. *Rogers*, 363 U.S. 666; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 314–315 ("Section 32 of the Trading With The Enemy Act * * * enacted after World War II, provided for administrative returns of property to certain classes of 'technical' enemies who were ineligible to bring suit under Section 9(a)."). See also H. Rept. 1269, 79th Cong., 1st Sess., pp. 1–2.

In the present case, petitioner's request for relief under Section 32 was denied, and it was pointed out that petitioner might file a timely suit for return under Section 9(a) (Pet. 4). Whatever may be the merits of that action, it cannot serve, as the court of appeals correctly held (Pet. App. A, a8–a9), to confer on the district court jurisdiction to entertain a claim by an "enemy."

States, as Successor to the Alien Property Custodian, et al., October Term 1960, No. 958. Petitioner has not filed such a suit.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1962.

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* We realize that petitioner may now be barred from proceeding in the Court of Claims by the statute of limitations. See *Soriano* v. *United States*, 352 U.S. 270. But the failure to pursue this avenue is one with which petitioner alone is chargeable, especially since it has long been settled that Section 9(a) is unavailable to one who falls within the Section 2 definition of "enemy".

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